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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

THE CADLE COMPANY, PETITIONER

v.

DIANE DENNIS, COURT REPORTER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This appeal involves several questions of first impression:

1. What standard of proof is required for a party to gain access to a court reporter's back-up audiotape to a stenographic transcript of a federal court proceeding; and

2. Was it appropriate for the bankruptcy court and the Fifth Circuit Court of Appeals to rely on the *Guide to Judiciary Policies and Procedures* (defined herein), a non-public record, to hold that a court reporter's back-up audiotapes are the exclusive personal property of the court reporter and whether such policies constitute regulations binding on litigants in federal court proceedings?

RULE 29.6

Petitioner is not a publicly traded company. There is no parent or publicly held company owning 10% or more of the stock of Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner THE CADLE COMPANY respectfully petitions that a Writ of Certiorari be issued to review the judgment and reported decision of the United States Court of Appeals for the Fifth Circuit entered December 18, 2007, because (1) that decision decided an important question of federal law that has not been, but should be, settled by this Court and (2) the Fifth Circuit Court of Appeals and lower court's reliance on 6 *Guide to Judiciary Policies and Procedures* § 16.5.4 (Court Reporters Manual) (Jan. 1998) ("**Guide to Judiciary Policies and Procedures**") was inappropriate because the manual is not a public record and is not a properly promulgated regulation that is binding on litigants in federal court procedings.

OPINIONS BELOW

The Bankruptcy Court's (defined below) *Order Denying Motion to Compel Compliance With Subpoena and/or for Order to Show Cause Why Court Reporter Should Not be Held in Contempt For Failure to Comply With Subpoena, Combined with Brief in Support Thereof* was entered January 20, 2006, and is not reported. (App. 8a-9a) The *Order* of the District Court on appeal affirming the Bankruptcy Court's decision was filed March 9, 2007, and is not reported. (App. 7a) The decision of the United States Court of Appeals for the Fifth Circuit, entered December 18, 2007, affirming the decisions of the courts below is published in the Federal Reporter. (App. 1a-6a) *See In re Pratt, infra.*

JURISDICTION

The *Judgment* of the United States Court of Appeals for the Fifth Circuit was entered on December 18, 2007. Pursuant to Supreme Court Rules 13.1 and 13.3, this petition has been filed within 90 days of the entry of the Judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISION INVOLVED

This case involves application of 28 U.S.C. § 753(b) which governs court reporters in federal proceedings.[1] Section 753(b) provides, in relevant part:

> The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.
>
> The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.
>
> The original notes or other original records and the copy of the transcript in the

[1] The full text of 28 U.S.C. § 753 is set out in the Appendix to this Petition. (App 15a-20a).

> office of the clerk shall be open during office hours to inspection by any person without charge.

28 U.S.C. § 753(b).

STATEMENT

In December 2000, Petitioner THE CADLE COMPANY ("**Petitioner**") filed an adversary action in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "**Bankruptcy Court**") against Debtor Jack E. Pratt, Jr. ("**Debtor**") styled *The Cadle Company v. Jack E. Pratt, Jr.* and referenced as Adversary No. 00-03600) (the "**Adversary Action**"). Petitioner objected to Debtor's bankruptcy discharge claiming, among other things, that Debtor concealed from his creditors his right to receive distributions from his mother's estate. The estate was being administered by Debtor's father. Debtor, Debtor's father, the administrative assistant to Debtor's father, and Debtor's sister testified at the discharge trial in favor of Debtor. Each of them claimed that Debtor did not conceal or fail to disclose his right to receive distributions from his mother's estate because he was not entited to and did not receive any distribution from her estate. Following trial, the Honorable Harold C. Abramson, United States Bankruptcy Judge ("**Judge Abramson**") entered judgment against Petitioner ("**Judgment**").

Petitioner appealed the Judgment to the United States District Court for the Northern District of Texas, Dallas Division. The District Court affirmed the Judgment. Petitioner then appealed to the Fifth

Circuit Court of Appeals. The Fifth Circuit affirmed the decision of the District Court and Bankruptcy Court. *See In re Pratt (The Cadle Co. v. Pratt)*, 411 F.3d 561 (5th Cir. 2005).[2]

Shortly after the Fifth Circuit's ruling, Petitioner discovered, in a collateral proceeding against Debtor's father, that the story maintained by Debtor, Debtor's father and his administrative assistant, and Debtor's sister in the Adversary Action was false. Debtor's father, the administrative assistant to Debtor's father, and Debtor's sister changed their story. In the collateral proceeding, instead of claiming that Debtor's distribution from his mother's estate was setoff against loans owing to his mother before her death, they claimed that Debtor actually received distributions from his mother's estate.[3] It was clear to Petitioner that Debtor, through his attorney, presented an incorrect factual position in defense of the Adversary Action and subsequent appeals. Petitioner uncovered this after the conclusion of the appeal of the Adversary Action to the Fifth Circuit.[4]

Accordingly, Petitioner filed a *Motion for Relief from Judgment* and a *Motion for Sanctions* in the Adversary Action (the "Motions"). On September 13,

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[2] Notably, the Fifth Circuit found the pre-death loan theory to be supported by the evidence, which turned out to be false. *Pratt*, 411 F.3d at 569 n.5.

[3] In these collateral proceedings, Petitioner alleged that Debtor's father breached his fiduciary duties owning to Debtor under his mother's will. *See Cadle v. Pratt, Sr.*, 3:03-CV-02273 (N.D. Tex.).

[4] Petitioner filed a Petition for Rehearing in the appeal of the Adversary Action on the basis of the changed story. However, the Petition for Rehearing was denied.

2005, a hearing was held on the Motions before the Honorable Steven A. Felsenthal, United States Bankruptcy Judge ("**Judge Felsenthal**"). Judge Felsenthal, ruling from the bench, denied the Motions after a contentious evidentiary hearing ("**Hearing**").[5]

Following the Hearing, Petitioner requested a transcript of the entire Hearing ("**Transcript**") from Diane Dennis of National Court Reporters ("**Court Reporter**"). Petitioner paid for this transcript.

On September 19, 2005, a portion of the Transcript was delivered to Petitioner. Petitioner contacted the Court Reporter's office to inquire why it received only a portion of the Transcript and was informed that Judge Felsenthal was reviewing the remainder of the Transcript, which contained his ruling from the bench, and the balance of the Transcript would be released pending his approval. Three days later Petitioner received the balance of the Transcript. (app. 10a-13a).

Also during this time, Petitioner learned that Judge Felsenthal, who had announced that he would be leaving the bench, had actually been offered a position with the law firm that represented Debtor's father. A prominent attorney from this law firm was Debtor's co-counsel in the Adversary Action. Debtor's father was also present in the courtroom during the Hearing.

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[5] The Adversary Action was transferred from Judge Abramson to Judge Felsenthal after Judge Abramson retired. Judge Felsenthal retired shortly thereafter. The Motions were heard by Judge Felsenthal just prior to his leaving the bench.

Petitioner did not learn of the conflict until after Judge Felsenthal denied the Motions.

After the issue was brought to Judge Felsenthal's attention, he effectively recused himself and withdrew his rulings on the Motions. The Adversary Action was then transferred to the Honorable Harlin D. Hale, United States Bankruptcy Judge ("**Judge Hale**").

Based on the above-described events, which raised serious issues regarding judicial impartiality and the accuracy of the Transcript of the Hearing, Petitioner requested that the Court Reporter provide Petitioner with an audiotape of the Hearing. The Court Reporter refused. (App. 14a).

Petitioner subpoenaed the Court Reporter requesting that the Court Reporter produce any and all audiotape versions of the Hearing. The Court Reporter failed to comply with the deadlines set forth in the subpoena, and Petitioner moved to compel compliance. The Court Reporter moved to quash the subpoena. A hearing was held on these motions before Judge Hale. Petitioner questioned the accuracy and veracity of the Transcript based on issues surrounding Judge Felsenthal's impartiality, the contentiousness of the hearing, and his pre-review of the Transcript.

At the end of the hearing, Judge Hale found, in part, that (1) Petitioner had not provided any reason to believe the Transcript was not reflective of the Hearing and (2) the audiotape was the property and work-product of the Court Reporter based on the Seventh Circuit Court of Appeals' decision in *Smith v. United*

States District Court Reporters, 203 F.3d 440 (7th Cir. 2000).[6] (App 10a-13a) Accordingly, he entered an order denying Petitioner's motion to compel. (App 8a-9a) The District Court affirmed without discussion. (App 7a) The Fifth Circuit affirmed. *See In re Pratt (The Cadle Co. v. Dennis)*, 511 F3d 483 (5th Cir. 2007).

REASONS FOR GRANTING THE PETITION

No specific statute or other law restricts access to audiotapes of transcribed proceedings in a civil proceeding. When a transcript is purchased, the purchasing party ought to be able to verify the accuracy of that transcript if there is any reason that calls that accuracy into question. The judicial system and its participants must be able to rely on accurate transcriptions of proceedings. Petitioner maintains that if there is any reason to draw into question the accuracy of the transcript of a proceeding an audiotape or other backup of the proceeding should be made available. The test should be objective rather than subjective – i.e., whether the party seeking the audiotape demonstrated "any reason" or "some reason" to question the accuracy of the transcript. Once a party

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[6] The full text of Judge Hale's ruling at the Hearing is contained in the Appendix to this Petition. (App 10a-13a). Judge Hale cites *Smith v. United States District Court Officers*, 203 F.3d 440 (7th Cir. 2000), as support for the holding that the audiotapes are the Court Reporter's personal property. *Smith* finds audiotapes to be the personal property of the court reporter based on "regulations" issued by the Judicial Conference to "flesh out the provisions of section 753." *Id.* at 442. These regulations are not generally available to the public but appear to have been promulgated by the Judicial Conference for internal purposes only. *See* discussion, *infra*.

establishes any reason, the party should have access to the audiotapes. The test should not be whether the reasons provided are, in the subjective determination of a court which employs the court reporter, "sufficient," "good," "reasonable," "valid," or "credible" - all purely subjective standards. The difficulty in adopting a subjective standard is that it sets the bar of proof to a virtually impossible level, particularly when parties raise a reason to question the transcript and yet are denied the very source to test the accuracy of the transcript - the audiotape - to prove the existence of error.[7] Access to the audiotapes of transcripts and the desire to preserve and maintain the integrity of the judicial process far outweigh any concerns the court reporter may have that the audiotapes constitute personal property. This is particularly true when the litigant requesting the audiotape paid for the transcription and offers to cover any cost incurred by the court reporter in producing the audiotape, including reasonable counsel fees and expenses. If the transcription is, in fact, accurate, the court reporter has nothing to be concerned about.

Further, the Fifth Circuit Court of Appeals and the lower courts inappropriately relied on the *Guide to Judiciary Policies and Procedures* to reach their

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[7] A subjective standard effectively creates a catch 22 for the requesting party when only circumstantial evidence of an error in the transcript exists. To sufficiently question the accuracy of the transcript in such a situation, a party needs the source of the transcription to demonstrate the error; however, according to the Fifth Circuit, to gain access to the source of the transcription (*i.e.*, the audiotape) the party must sufficiently prove the transcript is inaccurate. This circularity presents a problem without a fair and just solution.

decision to deny Petitioner access to the audiotapes. The manual is not a properly promulgated regulation binding on the public. The Judicial Conference cannot promulgate internal regulations or guidelines that have public force and effect. In finding and concluding that the Court Reporter's audiotape was inaccessible to Petitioner based on this manual effectively violates Petitioner's due process rights.

Only the Fifth and Seventh Circuit Courts of Appeals have addressed the questions raised by this petition. The Seventh Circuit, in a reported decision, states that when "some reason" is demonstrated, the audiotapes should be produced, notwithstanding a court reporters' claim that the tapes constitute her personal property. *See Smith v. United States District Court Officers*, 203 F.3d 440 (7th Cir. 2000) ("some reason").[8] The Fifth Circuit, ruling in the instant case, *In re Pratt*, *supra* (citing *Smith*, *supra*), found there was "no reason to doubt the accuracy of the transcript." *Pratt*, 511 F.3d at 485.[9]

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[8] There are a number of unreported decisions which have little precedential value. *See e.g.*, *United States v. Kopp*, 2007 WL 1461326 (W.D. N.Y. 2007); *United States v. Mondragon-Avilez*, 2006 WL 3589557 at *2 n.1 (D. Kan. 2006); *YHWHnewBN v. Board of Education*, 2006 WL 786724 (7th Cir. 2006) ("any reason"); *United States v. Cannon*, 2006 WL 3626353 (S.D. Ind. 2006). Other than *YHWHnewBN*, these decisions involve criminal proceedings and do not state that the requesting party must point out an inaccuracy in the transcript. They all rely on *Smith* for the "some reason" standard. YHWHnewBN actually imposes a "any reason" standard which the court assessed in a subjective manner. *YHWHnewBN*, 2006 WL 786724 at *1.

[9] The only other reported decision involving access to a court reporter's audiotapes is also in the Seventh Circuit, *Emmel v. Coca-Cola Bottling Co. of Chicago, Inc.*, 904 F.Supp. 723 (N.D. Ill.

The Fifth Circuit, in *In re Pratt*, and the Seventh Circuit in *Smith*, appear to be the only courts finding that the policies and practices set forth in what is referred to as the *Guide to Judiciary Policies and Procedures* constitute "regulations" binding on the public. *See In re Pratt*, 511 F.3d at 485 n. 2 (*citing* 28 U.S.C. § 753(b), "providing for promulgation of regulations by judicial conference to flesh out section 753."); *Smith*, 203 F.3d at 442. Neither decision offers an explanation as to why the *Guide to Judiciary Policies and Procedures* constitute properly promulgated regulations. The *Guide to Judiciary Policies and Procedures* is not a public record. Nor are the contents contained in any codified regulatory publication. *See e.g.*, Code of Federal Regulations.

1. An Objective Standard Should Be Adopted Regarding Access to Court Reporter Audiotapes.

This Court should carefully examine the application of 28 U.S.C. § 753 to the question of whether and to what extent a litigant in a civil proceeding in

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1995), *aff'd*, 95 F.3d 627 (7th Cir. 1996). In *Emmel*, Defendant Coca-Cola filed post-trial motions, including a motion to supplement the record with electronic recordings of the trial. *Id.* at 752-53. Coca-Cola had also ordered a transcript of the trial. The trial court found that Coca-Cola failed to raise an issue regarding the accuracy of the transcript and denied the motion to supplement.. *Id.* at 753. Although citing to section 753(b) and the *Guide to Judiciary Policies and Procedures*, the district court does not elaborate on the burden to gain access on what comprises an official record of a proceeding. *Id.* Thus, *Emmel* is no guidance on the issue at bar.

federal court may access a court reporter's back-up audiotapes of a transcription.

Without a doubt the audiotape of the Hearing remains the best source to determine the accuracy of the Transcript. Presumably the Court Reporter relies on the audiotape to assess the accuracy of her transcription. Once Petitioner raised any or some reason to question the veracity of the Transcript, no matter what that reason might be (a truly objective standard), the audiotapes should have been made available to Petitioner. From this source Petitioner could then test the veracity and accuracy of the Transcript (which it purchased) and all doubt would be erased. To allow Petitioner's reasons to be tested and weighed according to the discretionary and subjective standards of the judiciary (which employs and works with the court reporter) such as sufficiency, goodness, reasonableness and the like, critically injures Petitioner's ability to determine accuracy because, as is often the case, courts err on the side of protecting judicial personnel. Permitting objective access alleviates the suspicion of alteration or inaccuracy when the audiotape may be all a litigant possesses to establish this point.

The process and requirements involving court reporters in federal courts is governed by 28 U.S.C § 753(b) which provides, in relevant part, that "[t]he original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge." 28 U.S.C. § 753(b) (emphasis added). The history and case law surrounding the statute indicate its primary application was directed to criminal

proceedings. In fact, the *Smith* decision, *supra*, involved a criminal proceeding. There are no known statutes or regulations (promulgated by appropriately authorized federal agencies and available to the public) that apply to or govern original notes or records of transcriptions of proceedings in federal civil actions. Prior to the Fifth Circuit's decision in this case, the only known cases dealing with the issue have been noted above. *See Smith, supra*; *YHWHnewBN, supra.*

Smith is factually distinguishable from the instant case.[10] Other than its reliance on the *Guide to Judiciary Policies and Procedures*, which is misplaced, *see* discussion, *infra*, the holding of *Smith* actually supports Petitioner's position that an objective standard should be imposed in assessing whether access to audiotapes should be permitted.

In *Smith*, the audiotape at issue constituted the original record of the proceedings. *Id.* at 441-42 ("A transcript was made from the tape, but the transcript is not the original; the tape is."). Accordingly, the court directed that the audiotapes be released to Smith.

The audiotape at issue in *Smith* is different from audiotapes that are used as "back-up" to a court reporter's stenographically produced transcript. In the latter instance, *Smith*, in *dicta*, as well as Judge Hale and the Fifth Circuit in the instant case (relying on the *dicta* in *Smith*), hold that "back-up" tapes do not need

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[10] In *Smith*, a *pro se* prisoner sought access to tapes of his criminal proceeding. *Smith*, 203 F.3d at 441. The proceedings were recorded only by tape and not by a stenographic court reporter. *Id.* at 441-42.

to be produced because they are the "personal property" of the court reporter. *Id.*, *citing*, 6 *Guide to Judiciary Policies and Procedures* §§ 16.4.1 and 16.4.4 (Court Reporters Manual) (Jan. 1998). For reasons discussed below, this holding is misplaced. *See* discussion, *infra*. The Seventh Circuit, again in *dicta*, holds that "back-up" audiotapes are not to be considered judicial records and, therefore, are not available to the public, unless "some reason is shown to distrust the accuracy of the stenographic transcript."[11] *Id.* The Seventh Circuit does not elaborate on what it believes constitutes "some reason" and did not apply the standard in that circumstance because it had already determined that the audiotape constituted the original record of the proceeding and, therefore, the audiotape was to be produced. *Smith* also does not address whether the standard is to be applied subjectively or objectively.

In the instant case, Judge Hale and the Fifth Circuit stretch the "some reason" standard of *Smith* to the subjective extreme. The "some reason" standard in *Smith* – which left little guidance as to whether it was to be applied objectively or subjectively – is far less onerous than that placed on Petitioner in this case. Petitioner maintains that "some reason" simply cannot mean that Petitioner must specifically demonstrate glaring errors or defects in the Transcript to gain access to the audiotapes. This must be particularly true when the question of accuracy is circumstantial, as in

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[11] Again, this standard is a judicial creation based on a manual which is not available to the public. *See* discussion, *infra*.

the present case, and the audiotape is necessary to assess the doubt raised by such circumstances.

The Fifth Circuit adopts and expands the application of *Smith*. *In re Pratt*, 511 F.3d at 485 ("Cadle...has not shown *reason to doubt* the accuracy of the transcript provided." (emphasis added)). As noted, *Smith* required only "some reason." *Smith*, 203 F.3d at 442. The Fifth Circuit (affirming Judge Hale's reasoning) found that Petitioner "provided no reason" – in its mind – to justify access to the audiotapes. The analysis that follows was entirely subjective. *Id.*

However, Petitioner clearly presented numerous reasons to question the accuracy of the Transcript— all of which were summarily rejected based on the some subjective level by Judge Hale. *See* discussion, *supra*. Whether Judge Hale believed the reasons to be sufficient, good, reasonable, or otherwise, it still remains that reasons were presented. On that basis alone, access to the audiotape should have been permitted to confirm the veracity and trustworthiness of the Transcript and to maintain the integrity of the judicial process.

2. The *Guide to Judiciary Policies and Procedures* is Not an Enforceable Regulation and Its Enforcement Violated Petitioner's Due Process Rights.

Judge Hale relied on *Smith*, *supra*, for the proposition that audiotapes constitute a court reporter's personal property. (App 10a-13a) In *Smith*, the Seventh Circuit deemed the *Guide to Judiciary Policies and Procedures* to constitute regulations

promulgated by the Judicial Conference of the United States "pursuant to a statutory delegation of authority to flesh out the provisions of section 753." *Smith*, 203 F.3d at 442. The decision contains no discussion as to how the court came to this conclusion. The Fifth Circuit concurred, again without explanation. *See In re Pratt*, 511 F.3d at 485, n. 2.

Section 16.5.4 of the Guide to Judiciary Policies and Procedures provides:

> **16.5.4 Back up Tapes Made by Court Reporters**
>
> Back up tapes made by court reporters for their own convenience and not otherwise required by 28 U.S.C. § 753 are the personal property of the court reporters. There is no public entitlement to these recordings, with the exception of recordings of arraignments, changes of plea, and sentencings which are covered in section 16.5.1.

See Guide to Judiciary Policies and Procedures § 16.5.4.[12]

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[12] Petitioner does not possess and was unable to locate a copy of the *Guide to Judiciary Policies and Procedures*. It is not generally available to the public or legal profession. It is not available in local or law school libraries or on the Internet. The only reason Petitioner is able to quote the language of section 16.5.4 is because Petitioner received a facsimile of that section, and that section alone, from the United States District Clerk for the Northern District of Texas when Petitioner asked for an explanation as to why the Court Reporter was not producing her audiotape of the proceedings. (App. 14a)

The Court Reporter construed section 16.5.4 to preclude access to "back-up" audiotapes because the audiotapes constitute the Court Reporter's "work product." Whether or not the provision considers "personal property" to be the "work product" of a court reporter is unclear.[13] However, it would only make sense that the reason the Court Reporter, Judge Hale and the Seventh Circuit in *Smith*, would deny access to audiotapes is because the tapes were considered to be the "work product" of the court reporter, especially where the tapes are not required under 28 U.S.C. § 753. Regardless of what definition is given to "personal property," the *Guide to Judiciary Policies and Procedures* should not be binding on Petitioner and it was inappropriate for Judge Hale and the Fifth Circuit to give any deference to section 16.5.4 because it is not a regulation promulgated in accordance with federal rule-making procedures.

The Administrative Procedures Act (the "**APA**") governs federal regulatory agencies' rule-making power. 5 U.S.C. § 551, *et seq.* Regulatory agencies are empowered to create and enforce rules or regulations that carry the full force of a law on individuals, businesses or the general public. The courts of the United States are not considered a regulatory agency and, therefore, are not within the ambit of the APA. 5 U.S.C. § 551(1). Thus, the Judicial Conference, which Congress created to promulgate policies and regulations governing the judiciary, cannot create

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[13] Since Petitioner has no access to the *Guide to Judiciary Policies and Procedures*, Petitioner has no way of knowing whether it actually defines the term "personal property" as "work product."

regulations that have the effect of laws which are binding on the general public.[14]

At best, the *Guide to Judiciary Policies and Procedures*, which was created by the Judicial Conference, can be considered nothing more than a "staff manual" or guide to the internal rules and procedures of the Judicial Conference and those employed in the federal judiciary. The word "guide" in the title denotes that it was intended to only be a "guide" and not law. *See Guide to Judiciary Policies and Procedures (Court Reporter's Manual)* § 16.5.4 (Jan. 1998).

Only members of the judiciary, including court reporters, clerks, and judges, apparently have access to the *Guide to Judiciary Policies and Procedures.* In fact, when it was notified by the Court Reporter of section 16.5.4, Petitioner's request for a copy of the Guide was rejected.

Based on the foregoing, the Bankruptcy Court and Fifth Circuit's reliance on section 16.5.4 of the *Guide to Judiciary Policies and Procedures* as authority to preclude Petitioner's access to the audiotape clearly violated its due process rights. U.S. CONST. amend. V and XIV. Petitioner cannot and should not be bound by a regulation or policy that is not formulated by an agency of the federal government and which is unavailable or inapplicable to the general public.

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[14] Petitioner is not aware of any public power allowing the Judiciary to promulgate rules or regulations that are binding on the public at large.

CONCLUSION

This Court should grant the instant petition to consider this matter further, determine an appropriate standard to access a court reporter's audiotapes, and find that the United States Court of Appeals for the Fifth Judicial Circuit and lower courts' reliance on the *Guide to Judiciary Policies and Procedures* was inappropriate, and reverse the decision of the United States Court of Appeals for the Fifth Judicial Circuit.

Respectfully submitted,
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No. 07-10422

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

In The Matter Of: JACK E PRATT,
Debtor;

CADLE COMPANY,
Appellant

v.

DIANE DENNIS, COURT REPORTER,
Appellee

December 18, 2007, Filed

COUNSEL: For CADLE CO, Appellant: Bruce William Akerly, Linda D Thai, Bell, Nunnally & Martin, Dallas, TX.

For DIANE DENNIS, Court Reporter, Appellee: Gerrit M Pronske, Pronske & Patel, Dallas, TX.

JUDGES: Before GARWOOD, GARZA, and BENAVIDES, Circuit Judges.

OPINION BY: EMILIO M. GARZA

OPINION

EMILIO M. GARZA, Circuit Judge:

Cadle Company ("Cadle") appeals the district court's order denying Cadle access to audiotapes of a

bankruptcy court hearing. Doubting the accuracy of the stenographic transcript, Cadle moved for production of the backup audiotapes that the court reporter recorded to verify the accuracy of the transcript. The bankruptcy court denied Cadle's motion, and the district court affirmed. For the following reasons, we affirm.

Cadle initiated an adversary action against Jack E. Pratt, Jr. ("Debtor") in December 2000. The bankruptcy court entered judgment against Cadle in the adversary action. In response, Cadle moved for relief from the judgment and for sanctions against opposing counsel. In September 2005, Judge Steven A. Felsenthal issued an oral ruling on these two motions.[1] Before Judge Felsenthal entered the corresponding order(s), Cadle requested that the court reporter, Diane Dennis ("Dennis"), produce a transcript of the hearing. Dennis sent a portion of the transcript to Cadle but told Cadle that the remainder could not be sent at the time because Judge Felsenthal was reviewing those portions. A few days later Dennis sent the balance of the hearing transcript.

Before acquiring the complete transcript, Cadle learned that Judge Felsenthal was leaving the bench and had been offered a position with the law firm of Debtor's counsel. Cadle filed a motion to have Judge Felsenthal recuse himself. After learning of the conflict, Judge Felsenthal recused himself and vacated his orders in the case, including his ruling on the two motions. The case was then transferred to Judge Harlin D. Hale who reheard the two motions.

During the hearing before Judge Felsenthal, Dennis created a stenographic transcript, and an audiotape to

serve as a backup. After learning of Judge Felsenthal's conflict, Cadle questioned the accuracy of the transcript. Arguing the audiotapes provided the only way to verify the accuracy of the transcript, Cadle filed a motion to compel production of the tapes. Dennis filed a motion to quash. Judge Hale granted Dennis's motion to quash and denied Cadle's motion to compel production of the tapes. The district court summarily affirmed Judge Hale's order.

On appeal, Cadle repeats the arguments it raised below, claiming that the contentiousness of the hearing, Judge Felsenthal's recusal, and Judge Felsenthal's review of the transcript prior to it being received by Cadle support its claims of inaccuracy. "In reviewing cases originating in bankruptcy, we perform the same function as did the district court: Fact findings of the bankruptcy court are reviewed under a clearly erroneous standard and issues of law are reviewed *de novo*." *In re Soileau*, 488 F.3d 302, 305 (5th Cir. 2007) (internal quotation marks and citation omitted).

Judge Felsenthal vacated all of his orders in the case. Judge Hale then reheard the motions that had been before Judge Felsenthal and issued his own rulings. Because the sought-after audiotapes contain recordings of a hearing which resulted in rulings now vacated, Dennis argues that Cadle's appeal is moot. The vacatur obviously mooted any claim that Cadle may have had concerning the impact of the transcript's accuracy on the issues originally handled by Judge Felsenthal. However, Cadle claims that the hearings before Judge Felsenthal could be important to collateral proceedings, such as Cadle's pending action for sanctions against Debtor's counsel arising from the adversary

proceeding. As such, Cadle contends that it still has a right to the audiotapes to make sure the transcript is accurate. *But see In re Corrugated Container Grand Jury*, 659 F.2d 1330, 1331-32 (5th Cir. 1981) (noting that appellant's worry that district court's order will impact potential future litigation cannot overcome the jurisdictional concern that a live controversy be at stake at the time of the appeal).

Even if Cadle's claim is not entirely moot, Cadle has not shown it should be entitled to the tapes. While "[c]ourts have recognized. . . a common law right to inspect and copy judicial records," the right is not absolute. *S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993). 28 U.S.C. § 753 requires that court proceedings be recorded by a reliable method, including stenographic means or audiotape, and requires that the court reporter file the "original records" with the court. 28 U.S.C. § 753(b). In considering whether a court reporter's backup tapes constitute judicial records, the Seventh Circuit looked to § 753(b) and noted that backup tapes are not an original record of proceedings, nor are they filed with the court. *Smith v. U.S. District Court Officers*, 203 F.3d 440, 441-42 (7th Cir. 2000).[2] In *Smith*, the Seventh Circuit concluded that a party may obtain audiotapes which constitute original records, but may only obtain a court reporter's backup tapes if there is reason to doubt the accuracy of the stenographic transcript. *Id.* at 442.

Assuming *arguendo* that Cadle has some right of access under the circumstances outlined by the Seventh Circuit, Cadle still has not shown reason to doubt the accuracy of the transcript provided. 28 U.S.C. § 753(b) provides that "[t]he transcript in any case certified by

the reporter... shall be deemed prima facie a correct statement of the testimony taken and proceedings had." After an evidentiary hearing, Judge Hale specifically found that the transcript was not altered, that Dennis testified credibly that the transcript accurately reflected Judge Felsenthal's ruling, and further found that "Cadle [] did not plead and [its counsel] made clear this morning that it doesn't have a reason to believe the transcript doesn't comport with the hearing." Cadle has not shown that the bankruptcy court clearly erred in reaching these findings. The record provides no reason to doubt the accuracy of the transcript. Accordingly, Cadle cannot compel production of Dennis's audiotapes.[3]

For the foregoing reasons, we AFFIRM the judgment of the district court.

Footnotes

1The original adversary action was heard by Judge Harold Abramson who retired during the proceedings. After Judge Abramson's retirement the action was transferred to Judge Felsenthal.

2Regulations issued by the Judicial Conference of the United States state that a reporter's backup tapes are the personal property of the court reporter to which there is no public entitlement except for recordings of arraignments, charges of plea, and sentencing proceedings. *See* 6 *Guide to Judiciary Policies and Procedures* § 16.5.4 (Court Reporters Manual) (Jan. 1998); *see also* 28 U.S.C. § 753(b) (providing for promulgation of regulations by judicial conference to flesh out section 753).

3Cadle also raises a due process argument claiming that the bankruptcy court impermissibly relied only upon the Guide to Judiciary Policies and Procedures, *see* Footnote 2, *supra*, which according to Cadle carries no legal authority. Actually, the bankruptcy court relied upon the Seventh Circuit's decision in *Smith* to support its conclusion that production of the tapes could not be compelled. In *Smith*, the Seventh Circuit found support for its result in federal statutes, case law, and the Guide. The bankruptcy court's ruling can be presumed to rest on all of the sources pointed out in *Smith*. As such, Cadle's claim is without merit.

3/9/07

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CASE NO. 00-35214-HDH (CHAPTER 7)

IN RE:

JACK E. PRATT, JR., Debtor.

CIVIL ACTION NO. 3:06-CV-429-B

THE CADLE COMPANY, Plaintiff,

v.

PRATT, JR., Defendant.

ORDER

Before the Court is The Cadle Company's Appeal of Bankruptcy Judge Hale's Order Denying Motion to Compel Compliance with Subpoena and/or for Order to Show Cause Why Court Reporter Should Not Be Held in Contempt for Failure to Comply with Subpoena, which was entered on January 4, 206. Having reviewed the record on appeal, the briefing of the parties, and the relevant case law, the Court DENIES The Cadle Company's appeal.

SO ORDERED.

Signed January 20, 2006

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

CASE NO. 00-35214-HDH (CHAPTER 7)

IN RE:

JACK E. PRATT, JR., Debtor.

ADVERSARY NO. 00-03600

THE CADLE COMPANY, Plaintiff,

v.

PRATT, JR., Defendant.

ORDER DENYING MOTION TO COMPEL COMPLIANCE WITH SUBPOENA AND/OR FOR ORDER TO SHOW CAUSE WHY COURT REPORTER SHOULD NOT BE HELD IN CONTEMPT FOR FAILURE TO COMPLY WITH SUBPOENA COMBINED WITH BRIEF IN SUPPORT THEREOF

Before the Court is Plaintiff THE CADLE COMPANY's Motion to Compel Compliance With Subpoena and/or for Order to Show Cause Why Court Reporter Should Not be Held in Contempt For Failure to Comply With Subpoena, Combined With Brief in Support Thereof (the "Motion"). Having

considered the Motion, a well as argument in support thereof and in opposition thereto at a hearing held on December 12, 2005, the Court is of the opinion that the following order should be entered.

Accordingly, it is ORDERED that, for the reasons stated on the record at the hearing, the Motion shall be and is hereby DENIED.

BK. NO: 00-35214-HDH-7
ADV. NO: 00-3600

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE: JACK PRATT

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that on the 12th day of December, 2005, before the HONORABLE HARLIN D. HALE, United state Bankruptcy Judge at Dallas, Texas, the above styled and numbered cause came an for hearing, and the following constitutes the transcript of such proceedings as hereinafter set forth;

APPEARANCES

LAW OFFICES OF RICHARD SCHIRO
3710 Rawlins Street, Suite 1350
Dallas, Texas 75219
BY: Mr. Richard Schiro

APPEARING ON BEHALF OF THE DEBTOR

KIRKPATRICK & LOCKHART
2828 North Harwood, Suite 1800
Texas 75201
BY: Mr. Gerrit Pronske

APPEARING ON BEHALF OF DIANE DENNIS

BELL, NUNNALLY & MARTIN, LLP

3232 McKinney Avenue,
Suite 1400
Dallas, Texas 75204
BY: Mr. Bruce Akerly
APPEARING ON BEHALF OF THE CADLE COMPANY

*** and rule this morning. You can be out of here for the next ten minutes for sure.

(Brief recess ensued.)

THE COURT: Please be seated.

The Court's ruling, findings and conclusions will be as follows.

I want to say a couple of things on the record so that you're just aware of that.

Number one. I have not spoken to Judge Felsenthal about this case at all, either before or after his recusal.

So that the record's clear on that.

Number two. Judge Felsenthal and now Judge McGuire use the National Court Reporters. I have not spoken to anyone from National Court Reporters about this case at all.

Number three. The Cadle Company seeks the back-up tapes of the hearing. The Cadle Company did not plead and Mr. Akerly made clear this morning that it doesn't have a reason to believe that the transcript doesn't comport with the hearing.

Ms. Dennis testified credibly in direct and on crass that the transcript reflected the ruling. And further that the transcript was not altered by Judge Felsenthal.

Number four. The ruling by Judge Felsenthal has been vacated. Therefore, what he said in that hearing is irrelevant to this Court and will not affect this Court on the matters before it.

Number five. The tapes in question are not official records of the proceedings and are the court reporter's personal property. See Smith versus United States District court officers, 203 F. 3d 440.

MR. AKERLY: I'm sorry, Your Honor, 440?

THE COURT: 440.

For these reasons the motion to quash is granted. For the reasons stated, the motion to compel is denied.

I will make the observation that the better practice would be to leave out the possibility of contempt when there is a good-faith dispute. Although the motion to show cause is not altogether frivolous under the circumstances of a good-faith dispute, I will say that it is a bit of a stretch. We'll be in recess. Thank you.

MR. AKERLY: Thank you, Your Honor. (End of Proceedings.)

I, CINDY SUMNER, do hereby certify that the foregoing constitutes a full, true and complete transcription of the proceeding a heretofore set fort in the above-captioned and numbered cause in

typewriting by me.

CINDY SUMNER, CSR #5832
Certified Transcriber
Expires 12-31-05
NATIONAL COURT REPORTERS
500 S. Ervay, Suite 120-A
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214-651-8393

NATIONAL COURT REPORTERS
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Richardson, Texas 7508

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Fax No: 214-651-6068

September 23,2005

Mr. Akerly,

Your request for a copy of Diane Dennis' tape from the hearing in Jack E. Pratt, Jr., case number 00-35124, adv. number 00-3600 held on the 13th day of September 2005 before the Honorable Steven A. Felsenthal is denied.

Pursuant to 16.5.4 of the Judicial Guide of Court Reporter' Manual you are not entitled to a copy of the tape which is the court reporter's work product for convenience and aid in producing a transcript.

If you have any questions please call Mr. Ronnie Jacobson in the District Court Clerk's Office at 214-753-2100 and he can fax you a copy the rule. Thank you,

Cindy Sumner

Section 753, Reporters

(a) Each district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands shall appoint one or more court reporters.

The number of reporters shall be determined by the Judicial Conference of the United States.

The qualifications of such reporters shall be determined by standards formulated by the Judicial Conference. Each reporter shall take an oath faithfully to perform the duties of his office.

Each such court, with the approval of the Director of the Administrative Office of the United States Courts, may appoint additional reporters for temporary service not exceeding three months, when there is more reporting work in the district than can be performed promptly by the authorized number of reporters and the urgency is so great as to render it impracticable to obtain the approval of the Judicial Conference.

If any such court and the Judicial Conference are of the opinion. that it is in the public interest that the duties of reporter should be combined with those of any other employee of the court, the Judicial Conference may authorize such a combination and fix the salary for the perfornmance of the duties combined.

(b) Each session of the court and every other

proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. The regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recording or other means which may be used, Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as judge of the court may direct or a may be required by rule or order of court as may be requested by any party to the proceeding.

The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arraignments, pleas, and proceedings in connection with. the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording provided in this subsection and the original records so taken have been certified by him and filed with the clerk a provided in this subsection. He shall also

transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefore, or of a judge of the court, the reporter or other individual designated to produce the record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the party or judge making the request.

The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter or other individual designated to produce the record shall be deeded prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

(c) The reporters shall be subject to the supervision. of the appointing court and the Judicial Conference in the performance of their duties, including dealings with parties requesting transcripts.

(d) The Judicial Conference shall prescribe

records which shall be maintained and reports which shall be filed by the reporters. Such records shall be inspected and audited in the same manner as the records and accounts of clerk of the district courts, and may include records showing:

(1)the quantity of transcripts prepared;
(2)the fees charged and. the fees collected for transcripts;
(3)any expenses incurred by the reporters in connection with transcripts;
(4) the amount of time the reporters are in attendance upon the courts for the purpose of recording proceedings; and
(5) such. other information as the Judicial Conference may require.

(e) Each reporter shall receive annual salary to be fixed from time to time by the Judicial Conference of the United States. For the purposes of subchapter III of chapter 83 of title and chapter 84 of such title, a reporter shall be considered a lull-tine employee during any pay period for which a reporter receives a salary at the annual salary rate fixed far a full-time reporter under the preceding sentence. All supplies shall be furnished by the reporter at his own expense.

(f) Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court. Fees for transcripts furnished in criminal proceedings to persons proceeding under the Criminal Justice Act (18 U. S. C. 3006A), or

in habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis, shall be paid by the United States out of moneys appropriated for those purposes. Fees for transcripts furnished in proceedings brought under section 2255 of this title to persons permitted to sue or appeal in forma pauperis shall be paid by the United States out of money appropriated far that purpose if the trial judge or a circuit judge certifies that this suit or appeal is not frivolous and that the transcript is needed to decide the issue presented bar the suit or appeal. Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question). The reporter may require any party requesting a transcript to prepay the estimated fee in advance excepts to transcripts that are to be paid for by the United States.

If, upon the advice of the chief judge of any district court within the circuit, the judicial council of any circuit determines that the number of court reporters provided such district court pursuant to subsection (a) of this section is insufficient to meet temporary demands and needs and that the services of additional court reporters for such district court should be provided the judges of such. district court (including the senior judges thereof when such. senior judges are performing substantial judicial services for such court) on a contract basis, rather than by appointment of court reporters as otherwise provided in this section, and such judicial council notifies the Director of the Administrative Office, in writing, of such determination, the Director of the Administrative

Office is authorized to and shall contract, without regard to section 3709 of the Revised Statutes of the United States, as amended (41 U.S.C. 5), with. any suitable person, firm, association, or corporation, for the providing of court reporters to serve such district court under such terms and conditions as the Director of the Administrative Office finds, after consultation with the chief judge of the district court, will best serve the needs of such district court.

28 U.S.C. § 753.